APPENDIX A

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 2, 2008]

No. 07-3100

LADAWNYA K. CARPENTER et al.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
LESLIE WAYNE BOWLING et al.,	)
	)
Defendants-Appellants.	)
	)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO

Before: BATCHELDER and SUTTON, Circuit Judges; and BARZILAY, Judge.*

SUTTON, Circuit Judge. Three City of Franklin (Ohio) police officers argue that the district court erred in denying their motion for summary judgment with respect to Charles Combs' unlawful-arrest and unlawful-entry claims and Ladawnya Carpenter's excessive-force claim. We affirm.

I.

In July 2002, an Ohio court entered a consent agreement between Sarah Kirby and Charles Combs concerning the custody of their ten-month-old son, Tyler. The agreement gave Combs custody of Tyler from Sunday at 6:00 p.m. to Friday at 6:00 p.m., and it gave Kirby custody from Friday at 6:00 p.m. to Sunday at 6:00 p.m. All exchanges of Tyler, the agreement said, would "take place at [the] Franklin police department." JA 58.

On at least two occasions, Combs failed to bring Tyler to the police department on Friday evening, prompting Kirby to file a motion to hold Combs in contempt of court for violating the consent agreement. On August 16, when Combs again failed to bring Tyler to the station, Kirby told the police that she "had filed for contempt of court" against Combs, that Combs "was supposed to bring Tyler to the station" and "that there

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* The Honorable Judith M. Barzilay, Judge of the United States Court of International Trade, sitting by designation.

was a warrant for [Combs]." JA 201. The officers responded by going to Combs' apartment.

Combs answered the officers' knock on his door, and, after a brief discussion, the officers arrested him for violating the consent agreement. The arrest, according to all parties, occurred outside Combs' apartment. LaDawnya Carpenter, Combs' sister, who (along with Combs' mother and girlfriend) was visiting Combs at the time, told the officers that she had temporary custody papers at her house that would exonerate her brother. The officers told Carpenter to get the papers.

When Carpenter returned without the custody papers, she called Combs' attorney to determine whether the officers could arrest him without a warrant. After Carpenter handed him the phone, Officer Russell Whitman spoke to Combs' attorney, who informed him that the consent agreement had not been modified. Whitman also spoke with a representative of the Warren County Children's Services, who told him that Kirby "had the right to take the child." JA 79. Whitman then took Tyler from Carpenter, carried him out of the apartment and gave him to Kirby, who was waiting in the parking lot.

According to at least one of the officers, Carpenter "was screaming profanities" and "throwing objects about in the apartment" as "the officers were leaving the apartment with the child." JA 62. Carpenter denies these allegations. JA 125. Carpenter followed the officers into the parking lot and ultimately was arrested for disorderly conduct, a charge later dismissed, as was the charge against Combs.

In August 2003, Combs, Tyler and Carpenter filed a § 1983 action against the City of Franklin, Kirby and Officers Bowling, Whitman and Diekman in Ohio state court. The defendants removed the action to federal court, and the officers moved for summary judgment on qualified immunity grounds. The district court granted the motion with respect to the unlawful-arrest claim, holding that the officers had probable cause to arrest Combs. It denied the motion with respect to the unlawful-entry claim, reasoning in part that exigent circumstances did not justify the entry. And it denied the motion with respect to the excessive-force claim, reasoning that disputes of material fact remained over Carpenter's conduct and the officers' explanations for using force. Officers Bowling, Whitman and Diekman filed this interlocutory appeal. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

II.

To overcome a defendant's claim of qualified immunity, a plaintiff must establish (1) that the defendant violated a "constitutional right" and (2) that the right "was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). We must decide the first question, the Supreme Court has instructed, before we reach the second one. *Id.* at 200–01.

A.

The officers start, oddly enough, by arguing that "[t]he trial court erred by not granting the officers qualified immunity for the warrantless arrest claim of Charles Combs." Br. at 1. That is odd because, as we have just explained, the district court *granted*

summary judgment *for the officers* on this claim. Since the officers cannot appeal a victory and since Combs has not appealed this loss, that is the end of the matter.

B.

The officers next challenge the district court's conclusion that a triable issue of fact exists over Combs' unlawful-entry claim. We reject that challenge. While the officers say that Combs consented to their waiting in his apartment after his arrest and while consent is an acceptable basis for entering a person's home without a warrant, *see Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990), the summary-judgment record establishes a dispute over whether the officers indeed had consent to enter the home. Carpenter's and Combs' affidavits, for example, both say that the officers "forced their way into the apartment." JA 165, 184. Even though it remains unclear what cognizable harm Combs suffered as a result of the officers' entry—as he did not appeal the district court's conclusions that his arrest and the seizure of Tyler were lawful and as the entry seemingly benefitted him by allowing his sister time to contest his arrest—we affirm the district court's denial of the officers' claim for summary judgment on Combs' unlawful-entry claim.

C.

The officers next contest the district court's excessive-force ruling, arguing that the court should have rejected Carpenter's claim as a matter of law. Under the Fourth (and Fourteenth) Amendment,

individuals have a right to be free of excessive force when police arrest or seize them. *See Lyons v. City of Xenia*, 417 F.3d 565, 575 (6th Cir. 2005). Whether excessive force exists turns on the objective reasonableness of the officer's conduct in view of the circumstances facing the officer, an inquiry that accounts for "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* (internal quotation marks omitted and alterations in original); *see also Graham v. Connor*, 490 U.S. 386, 394–96 (1989).

When we construe the facts in Carpenter's favor, as we must, here is what happened: After the officers removed Tyler from the apartment and gave him to Kirby, Carpenter waited a moment, then went outside. Upon emerging from the building, Carpenter saw Kirby 30 to 40 feet away and shouted, "remember, Sunday at 6:00," reminding Kirby of her obligation to return Tyler to Combs on Sunday evening. JA 126. Carpenter insists she never cursed at Kirby and "wasn't threatening [her]." JA 128.

"Before [Carpenter] could even get [her] breath back [from shouting at Kirby], Officer Bowling had ahold of [her], screaming that he had had it with [her and] was sick of [her]." *Id.* After grabbing Carpenter from behind by both arms, Bowling "proceeded to shove [her] down the sidewalk," JA 129, and "body slammed [her] into a van parked in front of the apartments," JA 181. All the while, Carpenter was telling Bowling that he did not "have to do this" because she would voluntarily "turn around and let

[him] arrest [her]." JA 129. After pinning Carpenter against the van, Bowling "jerk[ed] hard on [her] arms," JA 132, and Officer Diekman "stuck his knee in [Carpenter's] back" and "grabbed [Carpenter's] other shoulder," JA 131. The officers then "repeatedly crushed [Carpenter] against the van while pulling back on both [of her] arms," making "a dent in the van." JA 186. "[N]ot sure what [the officers were] doing"—trying to handcuff her or injure her—Carpenter told them that "they were hurting [her]" and "continuously sa[id] please don't do this. I will stand up. I will let you handcuff me. I will let you arrest me. You don't have to do this to me." JA 131–32. Carpenter thus "wasn't fighting [the officers]" and "wasn't resisting arrest," though she admits that she lifted her head several times to plead for mercy. JA 132. Carpenter felt her "shoulder pop[]" while the officers jerked her arms, JA 131, and suffered injuries to her arms and shoulders during the arrest, requiring an emergency-room visit on the day after the arrest and periodic medical treatment and physical therapy since then.

As measured by the three factors identified in *Lyons* and *Graham*, these record-supported allegations create a triable issue of fact over whether the officers used excessive force. *First*, the charge at issue was disorderly conduct, and "[t]he crime of disorderly conduct" generally "is not a violent or serious crime, and this fact weighs in favor of using less force in arresting [someone for such conduct]." *Thacker v. Lawrence County*, 182 F. App'x 464, 472 (6th Cir. May 17, 2006). *Second*, nothing suggests that Carpenter posed a threat to the officers, and although Carpenter raised her voice at Kirby (who was 30 or 40 feet away)

she "wasn't threatening her," never cursed at her, was "not angry" with her and never made a move toward Kirby. JA 126, 128. *Third*, nothing suggests that Carpenter posed a risk of flight. "At all times," Carpenter "told Bowling that [she] was not going to resist him," and yet he still "was hurting [her]." JA 186. In view of the non-threatening nature of Carpenter's offense, the absence of any resistance by Carpenter and the absence of any threat to anyone, a jury crediting these fact-supported allegations could find that the officers used constitutionally excessive force.

The district court also correctly determined that case law clearly established this constitutional claim. *See St. John v. Hickey*, 411 F.3d 762, 772, 774 (6th Cir. 2005)("[W]e conclude the right of a nonviolent [and non-resistant] arrestee to be free from unnecessary pain knowingly inflicted during an arrest [for disorderly conduct] was clearly established as of November 9, 2000."); *see also Minchella v. Bauman*, 72 F. App'x 405, 408–09 (6th Cir. Aug. 13, 2003) (denying summary judgment to officers on an excessive-force claim—relating to an arrest in 1999—because the plaintiff's "crime was not severe," the plaintiff "posed no threat to the Officers or the community" and the evidence was "inconclusive as to whether [the plaintiff] was 'slammed' into the car, and . . . as to whether [the plaintiff] physically resisted the arrest"); *Davis v. Yovella*, No. 95-5415, 1997 WL 159363, at *5–6 (6th Cir. Apr. 2, 1997) (denying qualified immunity to an officer on an excessive-force claim because "the charges against [the plaintiff] . . .were not serious," "there [was] no evidence that [the plaintiff] posed a risk to the officers or anyone present," "the record show[ed]

that he did not resist arrest" and the plaintiff "sought medical attention for pain in his neck and back").

The officers complain that this conclusion fails to appreciate the risk of escalation they faced—as Carpenter was visibly upset about the situation with her brother, ha[illegible]oiced her frustrations to the officers and had previously been accused of harassing Kirby (several months earlier). Yet virtually any arrest of an individual by the police poses a risk of resistance and escalation. The question is whether that risk was real at the time the officers used force and, more pertinently, whether a triable issue of fact exists over that risk. Carpenter was 30 or 40 feet from Kirby and claims not to have done anything more than remind Kirby to return Tyler on Sunday. A jury could thus reasonably conclude, if it credited these factual allegations, that the police had no basis for immediately grabbing, sho[illegible]ng, body slamming and repeatedly crushing Carpenter against a van to prevent the situation from escalating. Even if we were to grant the officers' premise that they had a reasonable basis for fearing that the situation might escalate, moreover, that would not necessarily justify repeatedly crushing Carpenter against a van while jerking back hard on her arms—all in the context of arresting her for a relatively minor and non-threatening crime, one for which she "[a]t all times" did not resist the officers (save for raising her head to ask them to stop).

The officers also contend that the district court should have ruled for them as a matter of law because Carpenter's injuries were either *de minimis* (temporary scrapes and red marks) or pre-existing (her

alleged shoulder injuries). But the record does not unequivocally establish either point. Carpenter went to the emergency room on the day after her arrest, complaining of shoulder pain and bruising, and she has "actively receiv[ed] medical treatment for the injuries caused by the Franklin police officers." JA 186. While Carpenter previously had surgery on her left shoulder, that shoulder was "back to normal" by 1995 or 1996, well before her arrest. JA 107.

The officers add that Sergeant Whitman played no role in the arrest and indeed that Carpenter did not even allege that he participated in Carpenter's arrest. Both contentions fail to account for Whitman's affidavit, in which he admitted that he "assisted Officer Bowling [in] handcuff[ing] Carpenter" and in which he "den[ied] Plaintiffs' allegations that [he] pushed or slammed Carpenter into a van." JA 80. The second amended complaint, as well as other evidence in the record, shows that Carpenter did implicate Whitman in her claim. *See* JA 14 (alleging that "Bowling, *Whitman* [and] Diekman" arrested Carpenter "with unreasonable and excessive force") (emphasis added); JA 186 (Carpenter's affidavit indicating that "Officer Bowling and the *two* other Franklin Police officers forcibly pushed [her] into the side of a van parked in the parking lot and made a dent in the van with [her] body") (emphasis added).

The resolution of Carpenter's excessive-force claim in the end turns on several genuine issues of material fact, including at a minimum these: Was Carpenter walking toward, cursing at or otherwise threatening Kirby at the time of her arrest? Did the officers repeatedly body slam or crush Carpenter against the

van and jerk back unreasonably hard on her arms? And did Carpenter resist the arrest or the officers' attempt to handcuff her? "[W]hen the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury, the jury becomes the final arbiter of a claim of immunity." *Bouggess v. Mattingly*, 482 F.3d 886, 888 (6th Cir. 2007) (internal quotation marks and alteration omitted).

III.

For these reasons, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed January 10, 2007]

Case No. 1:05-cv-323

LADAWNYA K. CARPENTER, *et al.*,

Plaintiffs,

vs.

CITY OF FRANKLIN, OHIO, *et al.*,

Defendants.

U.S. Magistrate Judge Timothy S. Black

SUPPLEMENTAL MEMORANDUM OPINION AND ORDER

On December 22, 2006, this Court entered a Memorandum Opinion and Order granting in part and denying in part Defendants' motion for summary judgment. (Doc. 28). (The underlying facts are set out in detail in that Opinion and will not be repeated here.)

Defendants included in their motion for summary judgment an assertion that the defendant police officers are entitled to qualified immunity with respect to Plaintiff Ladawnya Carpenter s claim that the officers used excessive force in effecting her arrest on a charge of disorderly conduct. The purpose of this Supplemental Memorandum Opinion and Order is to address that assertion. For the reasons that follow, the Court finds that Defendants are not entitled to entry of summary judgment upon qualified immunity with respect to that claim as material questions of fact exist as to whether or not the police officers violated clearly established law and whether or not they are entitled to qualified immunity.

DISCUSSION

"Qualified immunity is an affirmative defense that shields government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Estate of Carter v. City of Detroit*, 408 F.3d 305, 310 (6th Cir. 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

To determine whether the officers are entitled to qualified immunity, the court must determine first, "whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated," and second "whether that right was clearly established." *Id.* The court may also consider "whether the plaintiff offered sufficient evidence to indicate that what the official[s] allegedly did was objectively unreasonable in light of the clearly

established constitutional rights." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 905 (6th Cir. 2004), *cert. denied sub. nom. Dickhaus v. Outlook Nashville, Inc.*, 544 U.S. 975 (2005).

This Court previously expressed that the offense for which Carpenter was arrested, disorderly conduct, is not a heinously serious crime (Doc. 28 at p. 27 (citing *Thacker v. Lawrence County*, 182 Fed. Appx. 464, 472 (6th Cir. 2006)), and that genuine issues of material fact exist as to whether or not Carpenter posed a threat to the safety of the officers or others, whether or when she was told that she was under arrest, and whether or not she resisted the officers' attempt to restrain her or to handcuff her (*id.* at pp. 27-28).

Because the facts are in dispute, and construing the allegations in a light favorable to Carpenter, the Court finds that she has alleged sufficient facts,[1] if proven, to establish a constitutional violation under the circumstances presented in this case.

In the motion for summary judgment, Defendants further argue that the officers are entitled to qualified immunity because the law surrounding the use of force was not clearly established at the time of the underlying arrest and in light of the particular facts of the case. (*See* Doc. 10 at p. 35.) This argument is not persuasive.

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[1] See Carpenter's Affidavit (Doc. 13-3, p. 9, ¶¶ 13-19;); see also Affidavit of Mary Zolecki (Doc. 13-3, pp. 4-5).

It was clearly established at the time of Carpenter's arrest – August 16, 2002 – that it would be unreasonable to use the amount of force alleged here against a suspect who allegedly poses no apparent threat and allegedly is not resisting the officer's attempt to arrest her. *See, e.g., Baker v. City of Hamilton*, ___ F.3d ___, 2006 WL 3702914, at *6 (6th Cir. Dec. 18, 2006) (noting that the right of people who pose no safety risk to the police to be free from gratuitous violence during arrest was clearly established in December 2002); *see also Lustig v. Mondeau*, No. 05-1905, 2006 WL 3253496, at *7 (6th Cir. Nov. 8, 2006)).

Accordingly, and for the reasons stated above, **IT IS HEREIN ORDERED THAT** Defendants' motion for summary judgment (Doc. 10) is **DENIED** in part with respect to Defendants' assertion that they are entitled to qualified immunity on Carpenter's excessive force claim. The pretrial record sets forth genuine issues of material facts for trial.

IT IS SO ORDERED.

Date: 1/10/07 s/Timothy S. Black
Timothy S. Black
United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed December 22, 2006]

Case No. 1:05-cv-323

LADAWNYA K. CARPENTER, *et al.*,

Plaintiffs,

vs.

CITY OF FRANKLIN, OHIO, *et al.*,

Defendants.

U.S. Magistrate Judge Timothy S. Black

MEMORANDUM OPINION AND ORDER

This is a civil rights action brought pursuant to 42 U.S.C. § 1983. The case is before the Court on defendants' motion for judgment on the pleadings (Doc. 8), defendants' motion for summary judgment (Doc. 10), and plaintiffs' second motion to remand (Doc. 14). Also pending is a motion by defendants for leave to supplement their motion for summary

judgment with an expert opinion. (Doc. 25.) The parties have consented to final disposition by the magistrate judge pursuant to 28 U.S.C. § 636(c). (*See* Docs. 19, 23).

For the reasons that follow, the motion for judgment on the pleadings is **GRANTED**; the motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**; and the second motion for remand is **DENIED**. The motion for leave to supplement is also **DENIED**.

I. BACKGROUND

A. The Parties

Plaintiffs LaDawnya K. Carpenter ("Carpenter"), Charles N. Combs ("Combs"), and Tyler Combs ("Tyler") (collectively "plaintiffs") are residents of the City of Franklin, Ohio. (Doc. 1, Att. 1 at p. 4, ¶ 6.) Tyler, a minor child, is Combs's son. (*Id.* at p. 4, ¶ 7.) Carpenter is Combs's sister. (*Id.* at p. 8, ¶ 34.)

Named defendants include the City of Franklin, Ohio, four members of the Franklin Police Department, Lt. Leslie W. Bowling, Sgt. Russell Whitman, Officer Diekman, and Officer Troy Wolf; and a Prosecutor for the City of Franklin, Steven Runge. (*Id.* at p. 4, ¶ 5.) Sarah Kirby ("Kirby"), who is Tyler's mother (and Combs's ex-girlfriend), was also named as a defendant in the original complaint. (*See* Doc. 8, Ex. A at p. 6, ¶ 2.)

B. Factual Allegations

In July 2002, Kirby had filed a civil action in the Warren County Court of Common Pleas against Combs for entry of a domestic violence protection order. (*Id.* at p. 6, ¶ 3.) As a result of a hearing held on July 8, 2002, which Combs and Kirby both attended, the state court entered an Order of Protection, which both Kirby and Combs signed, which provided, among other things, for the temporary custody of Tyler to be with Combs during the weekdays from Sunday at 6:00 p.m. to Friday at 6:00 p.m.; and the temporary custody of Tyler to be with Kirby on the weekends from Friday at 6:00 p.m. to Saturday at 6:00 p.m. (Doc. 8 at p. 4.) The domestic violence protective order entered by the state court also provided that "all exchanges to take place at Franklin Police department." (*Id.*)

On the evening of Friday, August 16, 2002, after Combs had failed to bring Tyler to the police station for the 6:00 p.m. transfer to Kirby, officers Wolf, Bowling, Whitman and Diekman appeared with Kirby at Combs's home. The officers allegedly entered the home without a search warrant or an arrest warrant in their possession and arrested Combs for violating the protective order and seized Tyler and transferred him into Kirby's physical custody. (Doc. 1, Att. 1 at p. 5, ¶ 10; Doc. 8, Ex. A at pp. 3-4, ¶ 4.)

Carpenter was present at Combs's home on August 16, 2002. (Doc. 1, Att. 1 at p. 8, ¶ 34.) Although Carpenter objected to the intended transfer of Tyler to Kirby, she was trying to dress him when one of the officers took Tyler from Carpenter, carried him

outside, and delivered him to Kirby, who then left with the child. (Doc. 13, Ex. 6 at ¶ 8.)

Alas, Carpenter followed the officers outside, allegedly simply to remind Kirby to bring the child back the following Sunday. (*See id.* at ¶¶ 9-10.) Carpenter was then arrested for disorderly conduct. (*Id.* at ¶ 37.) According to plaintiffs, an officer then "manhandled" Carpenter by throwing her against a van, pulling her arms back, and pushing her into the van. (Doc. 1, Att. 1 at p. 8, ¶ 35.) The charge against Kirby for disorderly conduct was dismissed on January 17, 2003, on statutory, speedy trial grounds. (*Id.* at p. 9, ¶ 43.)

The criminal proceedings against Combs were terminated in his favor on January 28, 2003. (Doc. 8, ex. A at 4-5, ¶ 9; Doc. 10, Ex. D.)

C. Procedural Hlistory

Plaintiffs initiated this action on August 8, 2003, by filing a complaint in the Warren County Court of Common Pleas against the City of Franklin, Lt. Bowling, Sgt. Whitman, Officer Diekman, and Sarah Kirby. (*See* Doc. 8, Ex. A). An amended complaint was filed on December 15, 2003. (*Id.*, Ex. B.)

On October 7, 2004, plaintiffs sought leave to file a second amended complaint withdrawing claims against Sarah Kirby and adding claims against two additional defendants, Officer Troy Wolf and Franklin City Prosecutor Steven Runge. (*Id.* at 2730.) Leave to file the amended complaint was granted over

defendants' objections on April 22, 2005. (*See* Doc. 1, Att. 1.)

On May 3, 2005, the state court judge, Hon. Neal B. Bronson, issued a decision granting in part and denying in part a motion for summary judgment by the City of Franklin, Lt. Bowling, Sgt. Whitman, and Officer Diekman. (Doc. 8, Ex. E.)

On May 11, 2005, Wolf filed a notice removing the state court action to federal court on the basis of federal question jurisdiction. (Doc. 1.) All of the other defendants consented to and joined in the removal. (*See id*; *see also* Doc. 16.)

Plaintiffs filed a motion to remand on the grounds that the removal was untimely and that the notice of removal was defective. (*See* Doc. 5.) On March 27, 2006, the motion to remand was denied by United States District Judge Michael H. Watson. (Doc. 16.)

On February 17, 2006, defendants filed a motion for judgment on the pleadings seeking to dismiss Officer Troy Wolf and Prosecutor Steven Runge. (Doc. 8.) The motion is unopposed. (*See* Doc. 14.)

On February 17, 2006, defendants separately filed a motion for summary judgment. (Doc. 10.) As grounds for their motion, defendants argue, *inter alia*, that plaintiffs have failed to establish any constitutional violations and that the individual police officers are entitled to qualified immunity. (*See id.*) Plaintiffs have filed a memorandum in opposition to the motion for summary judgment (Doc. 13), to which defendants have replied (Doc. 15). On October 19,

2006, defendants filed a motion to supplement their motion for summary judgment with an opinion letter from a law enforcement expert. (Doc. 25.)

On March 11, 2006, plaintiffs filed a second motion to remand this case to state court. (Doc. 14.) Plaintiffs state that, if the unopposed motion for judgment on the pleadings is granted, and Troy Wolf – the defendant who initiated the removal from state court – is dismissed, the Court's jurisdiction would terminate.

D. The Claims

The second amended complaint includes eight counts alleging unlawful conduct by defendants.

In Count I, plaintiffs allege that the officers' entry into Combs's home without a warrant and his arrest without a warrant violated his rights under the Fourth and Fourteenth Amendments. (Doc. 1, Att. 1 at ¶¶ 8-10.) Plaintiffs further allege that the officers' failure to prevent the entry into the home constitutes a separate violation of Combs's rights. (*Id.* at ¶ 11.)

In Count II, plaintiffs allege that Tyler was seized by the officers without a warrant or other legal right in violation of his rights under the Fourth and Fourteenth Amendments. (*Id.* at ¶ 16.)

In Count III, plaintiffs allege that the arrest and seizure of Combs and the seizure of Tyler Combs violated their constitutional rights of familial association and privacy. (*Id.* at ¶ 19.)

In Count IV, plaintiffs allege that the City of Franklin failed to adequately train its police officers. (*Id.* at ¶ 20.)

In Count V, plaintiffs allege that the officers failed in their duty to investigate prior to the arrest of Combs and the seizure of Tyler. (*Id.* at ¶ 24.)

In Count VI, plaintiffs state that defendants Bowling and Whitman, a police lieutenant and sergeant, respectively, failed to properly supervise the other officers in violation of plaintiffs' constitutional rights. (*Id.* at ¶ 29.)

In Count VII, plaintiffs state that the city prosecutor, Runge, ratified the constitutional violations committed by the other officers. (*Id.* at ¶ 29 [sic].)

In Count VIII, plaintiffs allege that the officers lacked probable cause to arrest Carpenter and used excessive and unreasonable force in effecting her arrest. (*Id.* at ¶ 35.) They further allege that she was maliciously prosecuted and denied her constitutionally protected right to a speedy trial. (*Id.* at ¶¶ 37, 43.)

Finally, plaintiffs allege that the defendant officers deprived Carpenter of her right of freedom from illegal confinement and imprisonment; her right of freedom from physical abuse, coercion, and intimidation; and her right of timely and effective assistance and medical aid, in violation of her rights under the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution; 42 U.S.C. §§ 1983 and 1985; and 18 U.S.C. § 245. (*Id.* at ¶¶ 50-51.)

Plaintiffs seek injunctive and monetary relief, including compensatory damages of $2,500,00.00 and punitive damages of $4,000,000.00. (*See id.* at pp. 11-12.)

II. PLAINTIFFS' SECOND MOTION TO REMAND

Because plaintiff's second motion to remand (Doc. 14) raises a threshold issue concerning the Court's subject matter jurisdiction, the Court shall dispose of that motion first. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587-88 (1999); *see also Midwest Motor Supply Co., Inc. v. Addis*, No. 2:05CV0733, 2006 WL 181990, at *1 (S.D. Ohio Jan. 23, 2006). For the reasons that follow, the motion is **DENIED**.

As grounds for their second motion to remand, plaintiffs argue that if the removing defendant, Troy Wolf, is dismissed as a defendant, the Court's jurisdiction would terminate. Their argument lacks merit.

It is well established that whether removal was proper is determined as of the time of the removal. *See Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996); *Boyd v. Diebold, Inc.*, 97 F.R.D. 720, 721 (E.D. Mich. 1983). "Once an action has been properly removed, however, plaintiff may not do anything to defeat federal jurisdiction and force a remand to state court." *Boyd*, 97 F.R.D. at 721 (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938); *Comstock v. Morgan*, 165 F. Supp. 798 (D. Mo. 1958)).

Moreover, the subsequent dismissal of the removing defendant does not divest the court's subject matter jurisdiction where it is based, as here, on federal question. *See Robinson v. Holiday Universal, Inc.*, No. CIV.A. 05-5726, 2006 WL 470592, at *3 (E.D. Pa. Feb. 23, 2006). If the district court's jurisdiction was proper at the time of removal, plaintiffs cannot "unring the bell" by dismissing the removing defendant. *Id.*

Accordingly, the second motion to remand (Doc. 14) is **DENIED**.

III. DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

In support of their motion for judgment on the pleadings, defendants argue that claims against Officer Troy Wolf and Franklin City Prosecutor Steven Runge are barred by the applicable statute of limitations. They further argue that claims against Runge should be dismissed as redundant of claims brought against the City of Franklin. Alternatively, they seek dismissal of claims against Runge on the grounds that he is entitled to quasi-judicial immunity and, because he acts as an agent for the State of Ohio, that claims against him are barred by the Eleventh Amendment.

Although the motion for judgment on the pleadings is unopposed, the Court will address the merits of the motion. *See Hackett v. G.D. Searle & Co.*, 246 F. Supp. 2d 591, 593 (W.D. Tex. 2002) (reviewing an unopposed motion for judgment on the pleadings on the merits after noting that it was a dispositive motion). *See also*

Carver v. Bunch, 946 F.2d 451, 455 (6th Cir. 1991) (holding that "a district court cannot grant summary judgment in favor of a movant simply because the adverse party has not responded").

A. Standard of Review

The standard of review for a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is the same as that for a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001); *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998). When ruling on a defendant's motion to dismiss on the pleadings, a district court "must construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief." *Kottmyer v. Maas*, 436 F.3d 684, 689 (6th Cir. 2006) (quoting *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 512 (6th Cir. 2001)). The court, however, need not accept as true legal conclusions or unwarranted factual inferences. *Id.* (citing *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 405 (6th Cir. 1998)).

B. Analysis

1. Statute of Limitations

Plaintiffs bring this case pursuant to the authority of 42 U.S.C. § 1983 seeking redress for a denial of their constitutional rights. Section 1983 actions brought in Ohio are subject to the two year statute of limitations

found in Ohio Rev. Code. Ann. § 2305.10. *See Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989).

Claims against Wolf are based on his alleged participation in the events of August 16, 2002. Thus, plaintiffs were required to bring those claims on or before August 16, 2004.

Claims against Runge are based on his role in the prosecution of criminal charges against Combs and Carpenter. The charges against Carpenter were dismissed on January 17, 2003; the proceeding against Combs was terminated on January 28, 2003. Using the later date, plaintiffs were required to present a claim against Runge no later than January 28, 2005.

Leave to file the second amended complaint naming Wolf and Runge was granted on April 22, 2005, after the statute of limitations had expired. Unless the amendment relates back to the original complaint, claims against Wolf and Runge are barred by the statute of limitations.

Under Fed. R. Civ. P. 15(c)(3)(B), an amended complaint that adds a new defendant relates back to the original complaint only if the newly-named defendant "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against [him]." *Dye v. City of Warren*, 367 F. Supp. 2d 1175, 1183 (N.D. Ohio 2005).

The Sixth Circuit has held that new parties may not be added after the statute of limitations has run, and that such amendments do not satisfy the mistaken

identity requirement of Rule 15(c)(3)(B). *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir.), *cert. denied*, 519 U.S. 821 (1996); *see also Reid v. City of Flint*, No. 04-73822, 2006 WL 2644993, at *3 (E.D. Mich. Sept. 14, 2006). Moreover, there is no evidence in the present case to show, nor any argument made, that either Wolf or Runge had notice that, but for a mistake concerning his identity, the original complaint would have been filed against him.

The claims against Wolf and Runge are barred by the statute of limitations.

2. Alternative Grounds For Dismissal of Runge

The alternative grounds presented for the dismissal of Runge are also well-taken.

Suing a municipal officer in his official capacity for a constitutional violation pursuant to 42 U.S.C. § 1983 is the same as suing the municipality itself. *Kraemer v. Luttrell*, 189 Fed. Appx. 361, 366 (6th Cir. 2006) (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (explaining that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent" and that "[b]ecause the real party in interest in an official-capacity suit [against a municipal officer] is the governmental entity and not the named official, the entity's policy or custom must have played a part in the violation of federal law")); *see also Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690-91 (1978).

Because Runge was named only in his official capacity, claims against him are in effect claims against the City of Franklin.

Additionally, a prosecutor acting within the scope of his duties in initiating and prosecuting a case is entitled to absolute immunity from suit for malicious prosecution. *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1978); *Holloway v. Brush*, 220 F.3d 767, 774-75 (6th Cir. 2000) (*en banc*). There is no evidence to show that Runge was not acting within the scope of his official duties. Finally, to the extent Runge may act as an agent of the State of Ohio in enforcing state laws, claims against him in his official capacity are barred by the Eleventh Amendment. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

In sum, it appears beyond doubt that plaintiffs can prove no set of facts that would entitle them to relief as against defendants Wolf and Runge. Accordingly, the motion for judgment on the pleadings (Doc. 8) is **GRANTED**.

IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The remaining defendants, City of Franklin, Lt. Bowling, Sgt. Whitman, and Officer Diekman, seek summary judgment dismissing all claims against them. (Doc. 10.)

In response, plaintiffs argue that genuine issues of material fact exist which preclude entry of summary judgment, and they object to defendants' attempt to

reargue issues already decided by the state court judge.

Before reaching the merits of the motion for summary judgment, the Court must address the issue of what import should be given to the state court decision.

A. Effect Of The State Court Decision

As previously noted, while this matter was pending in the state court, Judge Bronson issued a decision granting in part and denying in part a motion for summary judgment by defendants City of Franklin, Lt. Bowling, Sgt. Whitman, and Officer Diekman. (Doc. 8-3 at 2-5.)

A decision of a state court is not binding on the federal court to which a pending action has properly been removed. *See Newhouse v. Hansen*, No. 5:06 CV 1731, 2006 WL 2583412, at *4 (N.D. Ohio Sept. 7, 2006) (citing *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948)); *see also Munsey v. Testworth Labs.*, 227 F.2d 902, 903 (6th Cir. 1955). A federal court need not follow the law of the case declared by a state court when a case is removed on the basis of a federal question. *Ellison v. Empire Gen. Life Ins. Co.* (*Protective Life Corp.*), No. 89-3879, 1990 WL 191630, at *3 (6th Cir. Dec. 3, 1990) (citing 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice § 404(6) (2d ed. 1988)).

Judge Bronson's decision was not a final decision, and no judgment had been entered in the state court action. Because the state court judge still had

discretion to change his opinion until such time as he rendered a final, appealable decision, this Court also has discretion to revisit that decision. As the Sixth Circuit has explained: "The law of the case doctrine, when applied to the decisions of a coordinate court, is best described as 'a discretionary tool' that is used 'to promote judicial efficiency.'" *XL Sports, Ltd. v. Lawler*, 49 Fed. Appx. 13, 21-22 (6th Cir. 2002) (quoting *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990)); *but see Moses v. Business Card Exp., Inc.*, 929 F.2d 1131, 1137 (6th Cir.), *cert. denied*, 502 U.S. 821 (1991) (courts should be restrained in revisiting prior decisions).

B. Standard of Review

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323. All facts and inferences must be construed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a

motion for judgment as a matter of law. In response to a summary judgment motion properly supported by evidence, the nonmoving party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *Harris v. Adams*, 873 F.2d 929, 931 (6th Cir. 1989); *Sixty Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987).

The Court is not duty bound to search the entire record in an effort to establish a lack of genuinely disputed material facts. *Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 404 (6th Cir. 1992); *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied sub. nom. Superior Roll Forming Co. v. Interroyal Corp*, 494 U.S. 1091 (1990). Rather, the burden is on the nonmoving party "to present affirmative evidence to defeat a properly supported motion for summary judgment," *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989), and to designate specific facts in dispute. *Anderson*, 477 U.S. at 250; *Guarino*, 980 F.2d at 404-05.

C. Analysis

1. Combs's Claims

Defendants maintain that they are entitled to judgment as a matter of law with respect to claims asserted by Combs against the officers because he cannot show a constitutional violation based on his arrest and because the officers are entitled to qualified immunity. They argue that Combs's claims against the City of Franklin fail because he cannot

demonstrate any unlawful policy or practice or a failure to train. They also maintain that Combs cannot establish a substantive due process violation based on his rights of familial association or privacy.

a. Whether Combs can establish a Fourth Amendment violation based on the warrantless entry into the home

It is well established that the warrantless entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment except in a few well-defined instances based on the presence of exigent circumstances. *See Payton v. New York*, 445 U.S. 573, 586 (1980); *Katz v. United States*, 389 U.S. 347, 357 (1967).

As the United States Supreme Court has held: "To be arrested in the home involves the invasion attendant to all arrests but also the invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present." *Payton v, New York, supra*, 445 U.S. at 588-89 (quoting *United States v. Reed*, 572 F. 2d 412, 423 (2d. Cir. 1978), *cert. denied, sub nom. Goldsmith v. United States*, 439 U.S. 913 (1978)) (emphasis supplied).

Accordingly, to arrest Combs in his home required the presence of a warrant, as a matter of clearly established law. Here, there exists a genuine issue of material fact in dispute as to whether or not a warrant existed.

Moreover, as to exigent circumstances, they exist only where real immediate and serious consequences would certainly occur were a police officer to postpone action to get a warrant. *O'Donnell v. Brown*, 335 F. Supp. 2d 787, 804 (W.D. Mich. 2004) (citing *United States v. Williams*, 354 F.3d 497, 503 (6th Cir. 2003); *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 997 (6th Cir. 1994) (internal quotation marks and citation omitted).) There must be a "need to protect or preserve life or avoid serious injury." *O'Donnell*, 335 F. Supp. 2d at 805 (quoting *O'Brien*, 23 F.3d at 997); *see also Mincey v. Arizona*, 437 U.S. 385, 392 (1978). Furthermore, as in the present case, when authorities seek to enter a home in order to remove a child from his parent's custody, exigent circumstances do not exist where there is no evidence that the child was in immediate threat of death or severe physical harm. *See id.* (citation omitted).

The officers are not entitled to summary judgment based on their assertion that a warrant had been issued because, as found by Judge Bronson, genuine issues of material fact exist as to this claim.

Additionally, the officers are not entitled to summary judgment on the basis of exigent circumstances because there is no evidence that such circumstances existed.

Accordingly, Defendants are not entitled to summary judgment on Combs's claim for a violation of the Fourth Amendment based on the allegedly warrantless entry into his home to arrest him.

b. Whether the officers are entitled to qualified immunity

"Qualified immunity is an affirmative defense that shields government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Estate of Carter v. City of Detroit*, 408 F 3d 305, 310 (6th Cir. 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

To determine whether the officers are entitled to qualified immunity, the court must determine first, "whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated," and second "whether that right was clearly established." *Id.* The court may also consider "whether the plaintiff offered sufficient evidence to indicate that what the official[s] allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 905 (6th Cir. 2004), *cert. denied sub. nom. Dickhaus v. Outlook Nashville, Inc.*, 544 U.S. 975 (2005).

Judge Bronson determined that defendant police officers were not entitled to judgment as a matter of law on the grounds of qualified immunity with respect to claims brought by Combs and Tyler. (*Id.* at 2-4.) He based his determination on the absence of evidence that the officers were acting pursuant to a valid warrant. He held that in the absence of a warrant or other explanation, he could not conclude that the officers acted in good faith and, construing the facts in

a light favorable to plaintiffs, that reasonable minds could not conclude that a clearly established right was not violated as a matter of law.

This Court agrees that the officers are not entitled to summary judgment upon the basis of qualified immunity given the dispute in the material facts as to whether or not the officers, without warrants, entered the home and arrested Combs and seized Tyler. That is, viewing the factual allegations in Plaintiffs' favor, as required, the warrantless entry into the home would violate a clearly established constitutional right and would be objectively unreasonable in light of the clearly established constitutional rights.

Accordingly, upon the current record, the officers are not entitled to summary judgment on the basis of qualified immunity.[1]

c. Whether Combs can establish a Fourth Amendment violation based on his arrest without a warrant

Even if the officers' entry into Combs's home may have been contrary to the Fourth Amendment, his arrest, which is analyzed separately, *see O'Donnell*, 335 F. Supp. 2d at 806, was not.

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[1] Denial of qualified immunity is only an appealable final decision when it turns on an issue of law. A defendant who is entitled to invoke a qualified immunity defense may not appeal a district court's summary judgment order in so far as that order determines whether or not the pretrial record sets forth a genuine issue of material fact for trial. *McKenna v. City of Royal Oak*, ___ F.3d ___, 2006 WL 3408190, at *2 (6th Cir. Nov. 28, 2006).

An arrest without a warrant does not violate the Fourth Amendment if probable cause exists for the arresting officer's belief that a suspect has violated or is violating the law. *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979). "Probable cause" is defined as the "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Id.* at 37.

The officers possessed probable cause to arrest Combs for violating the court order. The undisputed evidence shows that a valid Domestic Violence Protective Order existed that not only established a visitation plan but also expressly authorized the arrest of the Respondent (Combs) for violating any of the terms of the Order. (*See* Doc. 10, Ex. A at pp. 1, 4.) It is also undisputed that on the night of his arrest, Combs's failure to deliver Tyler to the Franklin Police Department was in violation of the Protective Order.

Because probable cause existed for his arrest, Combs cannot establish a Fourth Amendment violation based solely on the arrest, and separate from the one based on the alleged warrantless entry into the home. Defendants are entitled to summary judgment in this respect.

d. Whether the arrest was made pursuant to an unlawful policy or custom

Defendants maintain that the City of Franklin is entitled to summary judgment in its favor because Combs cannot establish that his arrest was made

pursuant to an unlawful policy or custom and there is no evidence that the City acted with deliberate indifference in training its officers.

As noted by Judge Bronson, and as acknowledged by defendants, a single act can constitute an unconstitutional policy if the discretionary act was made by an official vested with final authority. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482 (1985). (*See* Doc. 8, Ex. F (citing *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).)

However, in light of the absence of evidence that Prosecutor Runge advised Kirby to *have the police enter Combs' s home without a search warrant and arrest him without a warrant* for violating the court's protective order, Combs cannot state a claim for an unlawful act by the City pursuant to an unlawful policy or custom. That is, because Combs does not have a claim for unlawful arrest, as the officers possessed probable cause to arrest him, Combs's only claim against the City would have to be based upon the allegedly unlawful entry into the home without a warrant. However, as to such claim, plaintiffs have failed to allege or evidence that Runge advised entry into the home without a warrant to arrest Combs.

Plaintiffs have a burden to respond to defendants' motion for summary judgment with some evidence to sustain their claim, and they have not done so. Thus, Combs has no claim against the City of Franklin for the allegedly unlawful entry into the home as a matter of custom or policy, and summary judgment shall be entered accordingly.

e. Whether the act of transferring Tyler to Sarah Kirby violated Combs's constitutional rights of familial association and privacy

Defendants maintain that they are entitled to summary judgment with respect to Combs's claim that the transfer of his son to Kirby violated his rights of familial association and privacy.

It was clearly established law in 2002 (and is now) that, except in extraordinary circumstances, a parent has a liberty interest in familial association and privacy that cannot be violated without adequate pre-deprivation procedures. *See Malik v. Arapahoe Cty. Dep't of Soc. Servs.*, 191 F.3d 1306, 1315 (10th Cir. 1999) (citing *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982)). The removal of a child from his custodial parent's home is constitutionally reasonable, however, if it is pursuant to a court order, is supported by probable cause, or is justified by exigent circumstances. *See Brokaw v. Mercer County*, 235 F.3d 1000,. 1010 (7th Cir. 2000) (emphasis supplied); *see also O'Donnell*, 335 F. Supp. 2d at 806-07.

The officers allege that they were acting pursuant to the authority of the Domestic Violence Protective Order of the state court, which expressly provided that Tyler would be in Kirby's custody between the hours of 6:00 p.m. Friday and 6:00 p.m. Sunday. (*See* Doc. 10, Ex. A.) Although the Order (properly) does not provide that the officers could enter the custodial parent's home without a warrant to effectuate the temporary change in custody, the undisputed facts show that Combs was in violation of the visitation provision and are sufficient to establish probable cause to support

the officers' seizure of Tyler and arrest of Combs. *See Brokaw*, 235 F.3d at 1010.

Accordingly, defendants are entitled to summary judgment on this claim.

2. Tyler's Claims

Defendants also seek summary judgment with respect to Tyler's claims on the grounds that he cannot establish an unlawful seizure based on his transfer by an officer from Carpenter to Sarah Kirby and because the officers are entitled to qualified immunity. They reassert that the officers' actions do not "shock the conscience" and thus do not establish a violation of Tyler's familial association or privacy rights

Defendant officers are entitled to judgment as a matter of law with respect to Tyler's claims of an unlawful seizure and a violation of his familial association and privacy rights because, as discussed above, probable cause existed to justify defendants' actions in removing him from Combs's home.[2]

The City of Franklin is also entitled to judgment as a matter of law on Tyler's claims because, as noted by Judge Bronson, Tyler has failed to come forward with any evidence of a discretionary act toward him by a vested official. *See Pembaur*, 475 U.S. at 482.

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[2] Nonetheless, to the extent that Tyler seeks to challenge the officers' warrantless entry into his (and his father's) home, defendant officers would not be entitled to judgment as a matter of law. It does not appear that such a claim is stated in the second amended complaint.

3. Carpenter's Claims

Finally, defendants maintain that they are entitled to judgment as a matter of law with respect to Carpenter's claims. First, they argue that they are entitled to qualified immunity because the officers had probable cause to arrest her for disorderly conduct and she has failed to present sufficient evidence to establish an excessive use of force claim. They also argue that she has failed to present evidence of an unlawful practice or policy to support her claims against the City of Franklin and that she has failed to present sufficient evidence to support a substantive due process claim.

a. Whether the officers had probable cause to arrest Carpenter for disorderly conduct

Defendants contend that they are entitled to qualified immunity with respect to Carpenter's claim that her arrest on a charge of disorderly conduct violated her rights under the Fourth Amendment. They are entitled to qualified immunity (and summary judgment) on this claim if they can show that they had probable cause to believe that she committed the offense. *See Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (*per curiam*).

In determining whether the officers had probable cause to arrest Carpenter for disorderly conduct, the Court examines whether, "at that moment [of the arrest,] the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had

committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91(1964).

The Ohio disorderly conduct statute provides in part as follows:

> (A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following:
>
> > (1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior;
> >
> > (2) Making unreasonable noise or an offensively coarse utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person;
> >
> > (3) Insulting, taunting, or challenging another, under circumstances in which that conduct is likely to provoke a violent response;
> >
> > (4) Hindering or preventing the movement of persons on a public street, road, highway, or right-of-way, or to, from, within, or upon public or private property, so as to interfere with the rights of others, and by any act that serves no lawful and reasonable purpose of the offender;
> >
> > (5) Creating a condition that is physically offensive to persons or that presents a risk of physical harm to persons or property, by any

> act that serves no lawful and reasonable purpose of the offender.

Ohio Rev. Code Ann. § 2917.11(A).

The statute also prohibits conduct, and makes it an arrestable offense, where "[t]he offender persists . . . after reasonable warning or request to desist" or the conduct is "committed in the presence of any law enforcement officer." Ohio Rev. Code Ann. § 2917.11(E). Carpenter was charged with violating § 2917.11(E). (*See* Doc. 10, Ex. C.)

The Ohio courts have held that a person may be found to have violated the disorderly conduct statute and engaged in "turbulent behavior" by confronting sheriff's deputies loudly and hostilely, and by failing to calm down when asked to do so. *See Thacker v. Lawrence County*, 182 Fed. Appx. 464, 470 (6th Cir. 2006) (citing *State v. Jackson*, No. 17128, 1998 WL 801367, at *3 (Ohio Ct. App. Nov. 20, 1998) (unpublished).)

The undisputed evidence shows that Carpenter was upset at the prospect of the officer removing Tyler from Combs's home, that she followed the officer carrying Tyler out of the residence, that her conduct was upsetting other children in the home, that the officers asked her to calm down and that she failed to do so, and that she shouted at Kirby in a voice loud enough to be heard 30-40 feet away. (*See* Doc. 10, Ex. C. at ¶¶ 11-14; Doc. 11, "Deposition of LaDawnya K. Carpenter" (hereinafter ("Dep."), at pp. 127, 13132, 147-48.)

Even accepting Carpenter's version of disputed facts, *e.g.*, she was not cursing and, while upset and crying, was not angry (*see* Dep. at pp. 148-49), a prudent officer could have believed that Carpenter was violating the statute based on her opposition to giving Tyler over to Kirby, the volume and delivery of her speech (not simply its content), and her persistent failure to calm down despite the officers' requests. *See Thacker*, 182 Fed. Appx. at 470 (citing *Beck*, 379 U.S. at 9; *Jackson*, 1998 WL 801367, at *3).

Carpenter has the burden of proving the absence of probable cause. *See St. John v. Hickey*, 411 F.3d 762, 769 (6th Cir. 2005). She has not presented sufficient evidence to create a genuine issue of fact as to the existence of probable cause. Thus, defendants are entitled to summary judgment on Carpenter's claim of an unlawful arrest.

b. Whether defendants are entitled to summary judgment on Carpenter's claim of an excessive use of force

Defendants also argue that Carpenter has failed to present sufficient evidence to establish a claim based on an excessive use of force. They seek leave to supplement their motion for summary judgment with an opinion letter by a law enforcement expert. (Doc. 25.)

The Sixth Circuit has determined that rulings on the admissibility of expert opinion evidence are within the discretion of the trial court. *See Brainard v. American Skandia Life Assur. Corp.*, 432 F.3d 655, 663 (6th Cir. 2005). "An expert opinion submitted in the

context of a summary judgment motion 'must be more that a conclusory assertion about ultimate legal issues.'" *Id.* (citation omitted). The opinion "must 'set forth facts' and, in so doing, outline a line of reasoning arising from a logical foundation." *Id.* (citations omitted).

The expert opinion in the present case states, *inter alia*, that a bruise sustained by Carpenter "might be consistent with an escort by an officer of a resistant suspect" and that the use of force by defendant officers Bowling, Whitman and Diekman was "proper" and "within the parameters of the Franklin (OH) Police Department's use of force policy" and the "nationally accepted guidelines of the law enforcement industry regarding use of force." (Doc. 25, Ex. A-2 at pp. 5-7.)

An excessive force claim is analyzed under the Fourth Amendment's "objective reasonableness" standard. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

The Court finds that the expert opinion submitted by defendants fails to meet the requirement for a factual basis and that the finding of a "proper" use of force is a conclusory assertion about an ultimate legal issue.

Accordingly, the motion for leave to supplement the motion for summary judgment (Doc. 25) is **DENIED**. The Court does not determine in this Order the issue of the admissibility of the expert's opinion at trial.

The Court finds further that disputed issues of material fact exist concerning Carpenter's conduct and the need for any use of force.

Whether the amount of force used in a particular case was reasonable "requires careful attention to the facts and circumstances . . ., including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [she] is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396; *see also St. John*, 411 F.3d at 771. These factors are not exhaustive; rather the ultimate question is "whether the totality of the circumstances justifies a particular sort of seizure." *Graham*, 490 U.S. at 396.

The crime of disorderly conduct is not a heinously serious crime. *See Thacker*, 182 Fed. Appx. at 472. The parties dispute whether Carpenter posed a threat to the safety of the officers or others, whether or when she was told that she was under arrest, and whether she resisted the officers' attempt to restrain her or to handcuff her.

In light of disputed issues of material fact, summary judgment is not appropriate on Carpenter's excessive force claim.

c. *Whether Carpenter presented sufficient evidence of an unlawful practice or policy to prevail on her claims against the City of Franklin*

In Count VII of the second amended complaint, Carpenter alleges that she was falsely arrested,

maliciously prosecuted, and denied a speedy trial by the City of Franklin.

Municipal liability attaches only where a plaintiff's injury is the result of an official custom or policy of the city. *Pembaur*, 475 U.S. 479. "To show the existence of an offending custom or policy, plaintiffs must adduce specific facts supporting their claim; conclusory allegations are insufficient." *Games Galore of Ohio, Inc. v. Masminster*, 154 F. Supp. 2d 1292, 1300 (S.D. Ohio 2001) (citing *Taylor v. Canton, Ohio Police Dep't*, 544 F. Supp. 783 (N.D. Ohio 1982)). A single act can constitute an unconstitutional policy if the discretionary act was made by an official vested with final authority. *Pembaur*, 475 U.S. at 482.

Here, as evidence of an unlawful policy, plaintiffs contend that the City Prosecutor, Runge, "ratified" the actions of the City. They argue further that criminal charges were filed against an eyewitness to these events, Mary Zolecki, to intimidate her and keep her from testifying at Carpenter's trial.

However, each of Carpenter's underlying claims – (1) that she was falsely arrested; (2) that she was maliciously prosecuted; and (3) that she was denied a speedy trial – fail on the evidenced facts as a matter of law.

(1) Carpenter was not falsely arrested as the Court has found upon the facts and law that the officers possessed probable cause to arrest her.

(2) Carpenter likewise cannot prove malicious prosecution, because lack of probable cause is an

element and the gist of the civil tort for malicious criminal prosecution, *see Trussell v. General Motors Corp.* (1990), 53 Ohio St. 3d 142, and here the officers possessed probable cause to prosecute upon the facts as a matter of law.

(3) As to Carpenter's claim that she was denied a speedy trial, a defendant's right to a speedy trial under the Sixth and Fourteenth Amendments is not self-executing – she must request or demand a speedy trial to invoke the constitutional protection *See State v. Butler*, 19 Ohio St. 2d 55, 56-57, 249 N.E.2d 818, 819 (Ohio 1969). Here, Carpenter has failed to establish that she took the necessary action to invoke the protection as the record before this Court reflects only that the state court dismissed the case. In any event, Carpenter's claim fails because she has not provided evidence of any custom or policy resulting in the delay in bringing her to trial. *See Monell*, 436 U.S. at 684; *see also Smith v. Shelby Cty.*, 3 Fed. Appx. 436, 438 (6th Cir. 2001).

Defendants being entitled to judgment as matter of law on these claims upon the undisputed material facts, summary judgment shall be entered accordingly.

d. Whether Carpenter presented sufficient evidence to prevail on a claim of a substantive due process violation

Next, defendants assert that they are entitled to judgment as a matter of law because Carpenter has failed to present sufficient evidence to support a substantive due process claim. Plaintiffs did not respond to this argument and have failed to establish

a genuine issue of material fact. Accordingly, Defendants are entitled to summary judgment on Carpenter's due process claim.

e. Whether plaintiffs have presented sufficient evidence to prevail on claims for failure to investigate, train and supervise the Officers (Counts IV-VI).

Defendants assert finally that they are entitled to judgment as a matter of law because plaintiffs have failed to present sufficient evidence to support their claims of failure to investigate, train and supervise. Plaintiffs did not support these claims by argument or evidence, and they have failed to establish a genuine issue of material fact. Accordingly, summary judgment shall be entered against plaintiffs on Counts IV, V, and VI.

4. Claims Under 42 U.S.C. § 1985 and 18 U.S.C. § 245, and Claims for Injunctive Relief

The second amended complaint also included claims for relief under 42 U.S.C. § 1985 and 18 U.S.C. § 245, as well as claims for injunctive relief. (*See* Doc. 1 at p. 11, ¶ 51.)

While this action was pending in state court, Judge Bronson granted summary judgment for defendants on plaintiffs' claims under 18 U.S.C. § 245 and 42 U.S.C. § 1985 and on plaintiffs' claims for injunctive relief. Plaintiffs do not now dispute this ruling, and Defendants are entitled to summary judgment on these claims.

V. CONCLUSION

For the reasons stated above, **IT IS HEREIN ORDERED THAT:**

1. Plaintiffs' second motion to remand (Doc. 14) is **DENIED**;

2. Defendants' motion for judgment on the pleadings (Doc. 8) is **GRANTED**; claims against defendants Troy Wolf and Steven M. Runge are **DISMISSED** with prejudice; and defendants Troy Wolf and Steven M. Runge are **DISMISSED** as parties to this case;

3. Defendants' motion for leave to supplement their motion for summary judgment with an expert opinion report (Doc. 25) is **DENIED**; and

4. Defendants' motion for summary judgment (Doc. 10) is **GRANTED IN PART** and **DENIED IN PART** as follows:

    a. Summary judgment is **GRANTED** in favor of defendants with respect to the following claims:

        - Combs's claim that he was arrested without probable cause;

        - Combs's and Tyler's claims based on an unlawful seizure and a violation of familial association and privacy rights;

        - Tyler's claims against the City of Franklin;

- Carpenter's claim that she was arrested without probable cause;
- Carpenter's claim that she was maliciously prosecuted;
- Carpenter's claim that she was denied a speedy trial;
- Carpenter's due process claim;
- Combs's and Carpenter's claims against the City of Franklin;
- claims under 18 U.S.C. § 245;
- claims under 42 U.S.C. § 1985; and
- claims for injunctive relief.

b. Summary judgment is **DENIED** with respect to the following:

- Plaintiffs' claims based on a warrantless entry into Combs's home;

and

- Carpenter's excessive force claim.

Accordingly, this case shall commence to trial only with respect to these two causes of action against defendants Bowling, Whitman and Diekman.

IT IS SO ORDERED.

Date: 12/22/06

s/Timothy S. Black
Timothy S. Black
United States Magistrate Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed July 17, 2008]

No. 07-3100

LADAWNYA K. CARPENTER, ET AL.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
LESLIE WAYNE BOWLING, ET AL.,	)
	)
Defendants-Appellants.	)
	)

ORDER

BEFORE: BATCHELDER and SUTTON, Circuit Judges; and BARZILAY,* Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other

* Hon. Judith M. Barzilay, Judge of the United States Court of International Trade, sitting by designation.

active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX E

Baldwin's Ohio Revised Code Annotated
Title XXXI. Domestic Relations--Children
Chapter 3113. Neglect, Abandonment, or Domestic Violence (refs & Annos)
Domestic Violence

R.C. § 3113.31 Petitions; protection orders concerning domestic violence or sexually oriented offense; support orders; sanctions for violations; notification of law enforcement agencies and courts

(A) As used in this section:

(1) "Domestic violence" means the occurrence of one or more of the following acts against a family or household member:

(a) Attempting to cause or recklessly causing bodily injury;

(b) Placing another person by the threat of force in fear of imminent serious physical harm or committing a violation of section 2903.211 or 2911.211 of the Revised Code;

(c) Committing any act with respect to a child that would result in the child being an abused child, as defined in section 2151.031 of the Revised Code;

(d) Committing a sexually oriented offense.

(2) "Court" means the domestic relations division of the court of common pleas in counties that have a domestic relations division, and the court of common pleas in counties that do not have a domestic relations division.

(3) "Family or household member" means any of the following:

(a) Any of the following who is residing with or has resided with the respondent:

(i) A spouse, a person living as a spouse, or a former spouse of the respondent;

(ii) A parent or a child of the respondent, or another person related by consanguinity or affinity to the respondent;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the respondent, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the respondent.

(b) The natural parent of any child of whom the respondent is the other natural parent or is the putative other natural parent.

(4) "Person living as a spouse" means a person who is living or has lived with the respondent in a common law marital relationship, who otherwise is cohabiting with the respondent, or who otherwise has cohabited

with the respondent within five years prior to the date of the alleged occurrence of the act in question.

(5) "Victim advocate" means a person who provides support and assistance for a person who files a petition under this section.

(6) "Sexually oriented offense" has the same meaning as in section 2950. 01 of the Revised Code.

(B) The court has jurisdiction over all proceedings under this section. The petitioner's right to relief under this section is not affected by the petitioner's leaving the residence or household to avoid further domestic violence.

(C) A person may seek relief under this section on the person's own behalf, or any parent or adult household member may seek relief under this section on behalf of any other family or household member, by filing a petition with the court. The petition shall contain or state:

(1) An allegation that the respondent engaged in domestic violence against a family or household member of the respondent, including a description of the nature and extent of the domestic violence;

(2) The relationship of the respondent to the petitioner, and to the victim if other than the petitioner;

(3) A request for relief under this section.

(D)(1) If a person who files a petition pursuant to this section requests an ex parte order, the court shall hold

an ex parte hearing on the same day that the petition is filed. The court, for good cause shown at the ex parte hearing, may enter any temporary orders, with or without bond, including, but not limited to, an order described in division (E)(1)(a), (b), or (c) of this section, that the court finds necessary to protect the family or household member from domestic violence. Immediate and present danger of domestic violence to the family or household member constitutes good cause for purposes of this section. Immediate and present danger includes, but is not limited to, situations in which the respondent has threatened the family or household member with bodily harm, in which the respondent has threatened the family or household member with a sexually oriented offense, or in which the respondent previously has been convicted of or pleaded guilty to an offense that constitutes domestic violence against the family or household member.

(2)(a) If the court, after an ex parte hearing, issues an order described in division (E)(1)(b) or (c) of this section, the court shall schedule a full hearing for a date that is within seven court days after the ex parte hearing. If any other type of protection order that is authorized under division (E) of this section is issued by the court after an ex parte hearing, the court shall schedule a full hearing for a date that is within ten court days after the ex parte hearing. The court shall give the respondent notice of, and an opportunity to be heard at, the full hearing. The court shall hold the full hearing on the date scheduled under this division unless the court grants a continuance of the hearing in accordance with this division. Under any of the following circumstances or for any of the following

reasons, the court may grant a continuance of the full hearing to a reasonable time determined by the court:

(i) Prior to the date scheduled for the full hearing under this division, the respondent has not been served with the petition filed pursuant to this section and notice of the full hearing.

(ii) The parties consent to the continuance.

(iii) The continuance is needed to allow a party to obtain counsel.

(iv) The continuance is needed for other good cause.

(b) An ex parte order issued under this section does not expire because of a failure to serve notice of the full hearing upon the respondent before the date set for the full hearing under division (D)(2)(a) of this section or because the court grants a continuance under that division.

(3) If a person who files a petition pursuant to this section does not request an ex parte order, or if a person requests an ex parte order but the court does not issue an ex parte order after an ex parte hearing, the court shall proceed as in a normal civil action and grant a full hearing on the matter.

(E)(1) After an ex parte or full hearing, the court may grant any protection order, with or without bond, or approve any consent agreement to bring about a cessation of domestic violence against the family or household members. The order or agreement may:

(a) Direct the respondent to refrain from abusing or from committing sexually oriented offenses against the family or household members;

(b) Grant possession of the residence or household to the petitioner or other family or household member, to the exclusion of the respondent, by evicting the respondent, when the residence or household is owned or leased solely by the petitioner or other family or household member, or by ordering the respondent to vacate the premises, when the residence or household is jointly owned or leased by the respondent, and the petitioner or other family or household member;

(c) When the respondent has a duty to support the petitioner or other family or household member living in the residence or household and the respondent is the sole owner or lessee of the residence or household, grant possession of the residence or household to the petitioner or other family or household member, to the exclusion of the respondent, by ordering the respondent to vacate the premises, or, in the case of a consent agreement, allow the respondent to provide suitable, alternative housing;

(d) Temporarily allocate parental rights and responsibilities for the care of, or establish temporary parenting time rights with regard to, minor children, if no other court has determined, or is determining, the allocation of parental rights and responsibilities for the minor children or parenting time rights;

(e) Require the respondent to maintain support, if the respondent customarily provides for or contributes to the support of the family or household member, or if

the respondent has a duty to support the petitioner or family or household member;

(f) Require the respondent, petitioner, victim of domestic violence, or any combination of those persons, to seek counseling;

(g) Require the respondent to refrain from entering the residence, school, business, or place of employment of the petitioner or family or household member;

(h) Grant other relief that the court considers equitable and fair, including, but not limited to, ordering the respondent to permit the use of a motor vehicle by the petitioner or other family or household member and the apportionment of household and family personal property.

(2) If a protection order has been issued pursuant to this section in a prior action involving the respondent and the petitioner or one or more of the family or household members or victims, the court may include in a protection order that it issues a prohibition against the respondent returning to the residence or household. If it includes a prohibition against the respondent returning to the residence or household in the order, it also shall include in the order provisions of the type described in division (E)(7) of this section. This division does not preclude the court from including in a protection order or consent agreement, in circumstances other than those described in this division, a requirement that the respondent be evicted from or vacate the residence or household or refrain from entering the residence, school, business, or place of employment of the petitioner or a family or

household member, and, if the court includes any requirement of that type in an order or agreement, the court also shall include in the order provisions of the type described in division (E)(7) of this section.

(3)(a) Any protection order issued or consent agreement approved under this section shall be valid until a date certain, but not later than five years from the date of its issuance or approval unless modified or terminated as provided in division (E)(8) of this section.

(b) Subject to the limitation on the duration of an order or agreement set forth in division (E)(3)(a) of this section, any order under division (E)(1)(d) of this section shall terminate on the date that a court in an action for divorce, dissolution of marriage, or legal separation brought by the petitioner or respondent issues an order allocating parental rights and responsibilities for the care of children or on the date that a juvenile court in an action brought by the petitioner or respondent issues an order awarding legal custody of minor children. Subject to the limitation on the duration of an order or agreement set forth in division (E)(3)(a) of this section, any order under division (E)(1)(e) of this section shall terminate on the date that a court in an action for divorce, dissolution of marriage, or legal separation brought by the petitioner or respondent issues a support order or on the date that a juvenile court in an action brought by the petitioner or respondent issues a support order.

(c) Any protection order issued or consent agreement approved pursuant to this section may be renewed in

the same manner as the original order or agreement was issued or approved.

(4) A court may not issue a protection order that requires a petitioner to do or to refrain from doing an act that the court may require a respondent to do or to refrain from doing under division (E)(1)(a), (b), (c), (d), (e), (g), or (h) of this section unless all of the following apply:

(a) The respondent files a separate petition for a protection order in accordance with this section.

(b) The petitioner is served notice of the respondent's petition at least forty-eight hours before the court holds a hearing with respect to the respondent's petition, or the petitioner waives the right to receive this notice.

(c) If the petitioner has requested an ex parte order pursuant to division (D) of this section, the court does not delay any hearing required by that division beyond the time specified in that division in order to consolidate the hearing with a hearing on the petition filed by the respondent.

(d) After a full hearing at which the respondent presents evidence in support of the request for a protection order and the petitioner is afforded an opportunity to defend against that evidence, the court determines that the petitioner has committed an act of domestic violence or has violated a temporary protection order issued pursuant to section 2919.26 of the Revised Code, that both the petitioner and the respondent acted primarily as aggressors, and that

neither the petitioner nor the respondent acted primarily in self-defense.

(5) No protection order issued or consent agreement approved under this section shall in any manner affect title to any real property.

(6)(a) If a petitioner, or the child of a petitioner, who obtains a protection order or consent agreement pursuant to division (E)(1) of this section or a temporary protection order pursuant to section 2919.26 of the Revised Code and is the subject of a parenting time order issued pursuant to section 3109.051 or 3109.12 of the Revised Code or a visitation or companionship order issued pursuant to section 3109.051, 3109.11, or 3109.12 of the Revised Code or division (E)(1)(d) of this section granting parenting time rights to the respondent, the court may require the public children services agency of the county in which the court is located to provide supervision of the respondent's exercise of parenting time or visitation or companionship rights with respect to the child for a period not to exceed nine months, if the court makes the following findings of fact:

(i) The child is in danger from the respondent;

(ii) No other person or agency is available to provide the supervision.

(b) A court that requires an agency to provide supervision pursuant to division (E)(6)(a) of this section shall order the respondent to reimburse the agency for the cost of providing the supervision, if it

determines that the respondent has sufficient income or resources to pay that cost.

(7)(a) If a protection order issued or consent agreement approved under this section includes a requirement that the respondent be evicted from or vacate the residence or household or refrain from entering the residence, school, business, or place of employment of the petitioner or a family or household member, the order or agreement shall state clearly that the order or agreement cannot be waived or nullified by an invitation to the respondent from the petitioner or other family or household member to enter the residence, school, business, or place of employment or by the respondent's entry into one of those places otherwise upon the consent of the petitioner or other family or household member.

(b) Division (E)(7)(a) of this section does not limit any discretion of a court to determine that a respondent charged with a violation of section 2919.27 of the Revised Code, with a violation of a municipal ordinance substantially equivalent to that section, or with contempt of court, which charge is based on an alleged violation of a protection order issued or consent agreement approved under this section, did not commit the violation or was not in contempt of court.

(8)(a) The court may modify or terminate as provided in division (E)(8) of this section a protection order or consent agreement that was issued after a full hearing under this section. The court that issued the protection order or approved the consent agreement shall hear a motion for modification or termination of the

protection order or consent agreement pursuant to division (E)(8) of this section.

(b) Either the petitioner or the respondent of the original protection order or consent agreement may bring a motion for modification or termination of a protection order or consent agreement that was issued or approved after a full hearing. The court shall require notice of the motion to be made as provided by the Rules of Civil Procedure. If the petitioner for the original protection order or consent agreement has requested that the petitioner's address be kept confidential, the court shall not disclose the address to the respondent of the original protection order or consent agreement or any other person, except as otherwise required by law. The moving party has the burden of proof to show, by a preponderance of the evidence, that modification or termination of the protection order or consent agreement is appropriate because either the protection order or consent agreement is no longer needed or because the terms of the original protection order or consent agreement are no longer appropriate.

(c) In considering whether to modify or terminate a protection order or consent agreement issued or approved under this section, the court shall consider all relevant factors, including, but not limited to, the following:

(i) Whether the petitioner consents to modification or termination of the protection order or consent agreement;

(ii) Whether the petitioner fears the respondent;

(iii) The current nature of the relationship between the petitioner and the respondent;

(iv) The circumstances of the petitioner and respondent, including the relative proximity of the petitioner's and respondent's workplaces and residences and whether the petitioner and respondent have minor children together;

(v) Whether the respondent has complied with the terms and conditions of the original protection order or consent agreement;

(vi) Whether the respondent has a continuing involvement with illegal drugs or alcohol;

(vii) Whether the respondent has been convicted of or pleaded guilty to an offense of violence since the issuance of the protection order or approval of the consent agreement;

(viii) Whether any other protection orders, consent agreements, restraining orders, or no contact orders have been issued against the respondent pursuant to this section, section 2919.26 of the Revised Code, any other provision of state law, or the law of any other state;

(ix) Whether the respondent has participated in any domestic violence treatment, intervention program, or other counseling addressing domestic violence and whether the respondent has completed the treatment, program, or counseling;

(x) The time that has elapsed since the protection order was issued or since the consent agreement was approved;

(xi) The age and health of the respondent;

(xii) When the last incident of abuse, threat of harm, or commission of a sexually oriented offense occurred or other relevant information concerning the safety and protection of the petitioner or other protected parties.

(d) If a protection order or consent agreement is modified or terminated as provided in division (E)(8) of this section, the court shall issue copies of the modified or terminated order or agreement as provided in division (F) of this section. A petitioner may also provide notice of the modification or termination to the judicial and law enforcement officials in any county other than the county in which the order or agreement is modified or terminated as provided in division (N) of this section.

(e) If the respondent moves for modification or termination of a protection order or consent agreement pursuant to this section, the court may assess costs against the respondent for the filing of the motion.

(F)(1) A copy of any protection order, or consent agreement, that is issued, approved, modified, or terminated under this section shall be issued by the court to the petitioner, to the respondent, and to all law enforcement agencies that have jurisdiction to enforce the order or agreement. The court shall direct

that a copy of an order be delivered to the respondent on the same day that the order is entered.

(2) Upon the issuance of a protection order or the approval of a consent agreement under this section, the court shall provide the parties to the order or agreement with the following notice orally or by form:

"NOTICE

As a result of this order or consent agreement, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition pursuant to federal law under 18 U.S.C. 922(g)(8). If you have any questions whether this law makes it illegal for you to possess or purchase a firearm or ammunition, you should consult an attorney."

(3) All law enforcement agencies shall establish and maintain an index for the protection orders and the approved consent agreements delivered to the agencies pursuant to division (F)(1) of this section. With respect to each order and consent agreement delivered, each agency shall note on the index the date and time that it received the order or consent agreement.

(4) Regardless of whether the petitioner has registered the order or agreement in the county in which the officer's agency has jurisdiction pursuant to division (N) of this section, any officer of a law enforcement agency shall enforce a protection order issued or consent agreement approved by any court in this state in accordance with the provisions of the order or agreement, including removing the respondent from the premises, if appropriate.

(G) Any proceeding under this section shall be conducted in accordance with the Rules of Civil Procedure, except that an order under this section may be obtained with or without bond. An order issued under this section, other than an ex parte order, that grants a protection order or approves a consent agreement, that refuses to grant a protection order or approve a consent agreement that modifies or terminates a protection order or consent agreement, or that refuses to modify or terminate a protection order or consent agreement, is a final, appealable order. The remedies and procedures provided in this section are in addition to, and not in lieu of, any other available civil or criminal remedies.

(H) The filing of proceedings under this section does not excuse a person from filing any report or giving any notice required by section 2151.421 of the Revised Code or by any other law. When a petition under this section alleges domestic violence against minor children, the court shall report the fact, or cause reports to be made, to a county, township, or municipal peace officer under section 2151.421 of the Revised Code.

(I) Any law enforcement agency that investigates a domestic dispute shall provide information to the family or household members involved regarding the relief available under this section and section 2919.26 of the Revised Code.

(J) Notwithstanding any provision of law to the contrary and regardless of whether a protection order is issued or a consent agreement is approved by a court of another county or a court of another state, no court

or unit of state or local government shall charge any fee, cost, deposit, or money in connection with the filing of a petition pursuant to this section or in connection with the filing, issuance, registration, or service of a protection order or consent agreement, or for obtaining a certified copy of a protection order or consent agreement.

(K)(1) The court shall comply with Chapters 3119., 3121., 3123., and 3125. of the Revised Code when it makes or modifies an order for child support under this section.

(2) If any person required to pay child support under an order made under this section on or after April 15, 1985, or modified under this section on or after December 31, 1986, is found in contempt of court for failure to make support payments under the order, the court that makes the finding, in addition to any other penalty or remedy imposed, shall assess all court costs arising out of the contempt proceeding against the person and require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt.

(L)(1) A person who violates a protection order issued or a consent agreement approved under this section is subject to the following sanctions:

(a) Criminal prosecution for a violation of section 2919.27 of the Revised Code, if the violation of the protection order or consent agreement constitutes a violation of that section;

(b) Punishment for contempt of court.

(2) The punishment of a person for contempt of court for violation of a protection order issued or a consent agreement approved under this section does not bar criminal prosecution of the person for a violation of section 2919.27 of the Revised Code. However, a person punished for contempt of court is entitled to credit for the punishment imposed upon conviction of a violation of that section, and a person convicted of a violation of that section shall not subsequently be punished for contempt of court arising out of the same activity.

(M) In all stages of a proceeding under this section, a petitioner may be accompanied by a victim advocate.

(N)(1) A petitioner who obtains a protection order or consent agreement under this section or a temporary protection order under section 2919.26 of the Revised Code may provide notice of the issuance or approval of the order or agreement to the judicial and law enforcement officials in any county other than the county in which the order is issued or the agreement is approved by registering that order or agreement in the other county pursuant to division (N)(2) of this section and filing a copy of the registered order or registered agreement with a law enforcement agency in the other county in accordance with that division. A person who obtains a protection order issued by a court of another state may provide notice of the issuance of the order to the judicial and law enforcement officials in any county of this state by registering the order in that county pursuant to section 2919.272 of the Revised Code and filing a copy of the registered order with a law enforcement agency in that county.

(2) A petitioner may register a temporary protection order, protection order, or consent agreement in a county other than the county in which the court that issued the order or approved the agreement is located in the following manner:

(a) The petitioner shall obtain a certified copy of the order or agreement from the clerk of the court that issued the order or approved the agreement and present that certified copy to the clerk of the court of common pleas or the clerk of a municipal court or county court in the county in which the order or agreement is to be registered.

(b) Upon accepting the certified copy of the order or agreement for registration, the clerk of the court of common pleas, municipal court, or county court shall place an endorsement of registration on the order or agreement and give the petitioner a copy of the order or agreement that bears that proof of registration.

(3) The clerk of each court of common pleas, the clerk of each municipal court, and the clerk of each county court shall maintain a registry of certified copies of temporary protection orders, protection orders, or consent agreements that have been issued or approved by courts in other counties and that have been registered with the clerk.